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Supreme Court, U.S.
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No. 98-462

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1998

FRANCIS H. WOODWARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY OF PETITIONER

Bruce A. Singal
DONOGHUE, BARRETT & SINGAL, P.C.
One Beacon Street
Boston, MA 02108
(617) 720-5090

Counsel for Petitioner

IDPY

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REASONS FOR GRANTING THE WRIT

I. IN URGING DENIAL OF THE PETITION THE GOVERNMENT MISCHARACTERIZES PETITIONER'S CHALLENGES

In an effort to minimize the importance of the issues raised by the Petition, the government's opposition attempts to recast petitioner's arguments largely as narrow challenges to the evidentiary sufficiency underlying his convictions. See Brief for the United States in Opposition (Opp.) at 10. This Reply addresses briefly certain of the misperceptions underlying the Opposition, and demonstrates further that the concerns raised by the petitioner implicate fundamental rights which are threatened by prosecutions of this type. In light of the proliferating number of honest services cases, it is critical that this Court for the first time determine the proper scope of 18 U.S.C. §1346, and ensure that prosecutions under that provision do not ensnare individuals who are engaged in non-criminal, albeit unattractive, conduct. Accordingly, and for the reasons cited in the Petition, as amplified herein, the Court should grant the Petition.

The government seeks in its opposition to relegate this appeal to a review of the sufficiency of the evidence, Opp. at 10-13. In doing so, it ignores the issues raised in the Petition relating to the proper scope and quantum of evidence necessary generally to secure a §1346 conviction, particularly with respect to the intent to defraud element. See Petition at 10.

In seeking to elude resolution of the broader questions presented, the government states that no decision has been cited or found which conflicts with the circuit court's decision, and that Woodward cites no case holding that §1346 requires evidence of a direct link between Woodward's receipt of gratuities and

resulting action favorable to the donor which Woodward would not have taken but for receipt of the gratuity. Opp. at 11.

The response to this assertion is two-fold. First, if the government were correct, it would mean that §1346 prosecutions would continue unabated in a standardless vacuum, without the benefit of the careful analysis and precise interpretation by this court which is necessary to prevent overly broad applications[1] and extensions of its provisions. In this scenario, the circuit court would have "decided an important question of federal law that has not been, but should be, settled by the court ..." Sup. Ct. Rule 10(c).

More fundamentally, however, as noted in the Petition at 7-8, the circuit court's decision built upon the expansion of the honest services fraud doctrine begun in U.S. v. Sawyer, 85 F.3d 713 (1st Cir. 1996). There the First Circuit recognized that honest services prosecutions of public officials has historically involved bribery where the official was paid for a particular decision or action or failure to disclose a conflict of interest resulting in personal gain. Despite this recognition, the court in Sawyer (and

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[1] The government amends that Woodward's void for vagueness challenge to §1346 cannot prevail, in the absence of First Amendment infringements, because the statute clearly applies to his own conduct. Opp. at 17 n. 3. For the reasons recited in the Petition, particularly with respect to the undefined nature of the intent to defraud element, Woodward rejects the notion that the statute clearly applies to his own conduct. Even if it did, however, his First Amendment freedom of association, with Sawyer and other lobbyists, is implicated. Thus, his void for vagueness challenge (and his related overbreadth argument) merit consideration by the Court.

subsequently in Woodward) broadened the scope of conduct subject to criminal liability.

This expansion represents a circuit conflict within the meaning of Sup. Ct. Rule 10(c), inasmuch as it clashes with the notion (implicit in the cadre of cases cited as Appendix D to the Petition), that conviction for honest services fraud requires either quid pro quo bribery or blatant conflict of interest. Moreover, the circuit court's decision constitutes a traditional circuit conflict when compared with the decision in U.S. v. Bloom, 149 F.3d 649 (7th Cir. 1998). In affirming the dismissal of an indictment premised upon alleged honest services deprivation by a Chicago alderman, the Seventh Circuit rejected the type of expansion effected by Sawyer and Woodward, stating:

> No one can be sure how far the intangible rights theory of criminal responsibility really extends because it is a judicial gloss on § 1341. Congress told the courts in § 1346 to go right on glossing the mail fraud and wire fraud statutes along these lines. Given the tradition (which verges on constitutional status) against common law federal crimes, and the rule of lenity that requires doubts be resolved against criminalizing conduct, it is best to limit the intangible rights approach to the scope it held when the Court decided (and Congress undid) McNally.

Bloom, 149 F.3d at 656. (emphasis added).[2]

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[2] To be sure, Bloom was decided in the context of considering the statute's application to a private fiduciary. Its pronouncements are no less instructive here, however, for they reflect a fundamental disagreement with the First Circuit's decisions in Sawyer and Woodward.

The circuit court's decision disregards this concept completely by effectuating a dramatic evolution in the area of honest services fraud prosecution. As such, it constitutes a circuit conflict worthy of review by this Court.[3]

In arguing that the necessary link between gratuities and official action has been proven in this case, the government parrots the circuit court's reasoning that the jury could infer that Woodward knew the gratuities would continue as long as he voted favorably to Hancock's interests. Opp. at 11. No circuit court has permitted a §1346 conviction to rest on such an amorphous link between receipt of the gratuity and action by the donee favorable to the donor, however.[4]

Illustrative of the difficulties posed by acceptance of such an argument are two major pieces of evidence overlooked in the Opposition. First, Sawyer continued paying for meals, golf, and entertainment for Woodward for fifteen months after he was deposed as House Chair of the Insurance Committee, which did not deal with insurance issues. Appendix to Brief of Defendant-

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[3] These issues are closely related to (and to some degree overlap with) those deemed worthy of this Court's review in U.S. v. Sun Diamond Growers, cert. granted No. 98-131. Despite the government's attempt to distance this case from Sun Diamond (Opp. at 10 n.4), the fact remains that the questions of criminal conduct versus merely unattractive "wining and dining" permeate both cases. Moreover, contrary to the government's assertion, the requirement that gratuities be given "for or because of any official act" was present in this prosecution through the application of Mass. G.L. c. 268A, §3.

[4] As noted in the Petition, several district courts (relying on Sawyer) have adopted such a view. See Petition at 9 n.6.

Appellant filed in First Circuit Court of Appeals (hereinafter "A____") at A272. During this period Sawyer paid for $1,340 in such shared entertainment, greater than the amount he paid the previous year when Woodward was potentially of great value to Hancock. If the theory is that Woodward received the gratuities knowing he had to act favorably to Hancock in order to continue receiving them, then why does he continue to receive them unabated after he no longer occupies a legislative position allowing him to help Hancock?

This theory of prosecution is also undermined by undisputed evidence that Woodward frequently acted contrary to Hancock's interests on matters of great concern to Hancock. Petition at 5. For example, just three weeks after Sawyer paid for $487.47 worth of food, golf, and entertainment for Woodward at a COIL conference, Woodward rebuffed Hancock on the bill which evidence at trial showed to be the single most important matter presented to the jury -- the bill that would have cost Hancock its lucrative $200 million state employee health insurance contract. If continued receipt of gratuities was contingent on Woodward's subservience to Hancock's interests, why was he able to oppose Hancock on this and many other critical pieces of legislation and still continue to receive the gratuities? The answer, we suggest, lies in the close (and also undisputed) personal friendship between Woodward and Sawyer, and their families.

It is not enough for the government to suggest that these were mere disputes of evidentiary sufficiency. Rather, they go to

the heart of the appropriate scope of §1346 prosecutions, and the proper standards to be employed in honest services cases.[5]

II. THE GOVERNMENT'S OPPOSITION IGNORES FUNDAMENTAL DEFICIENCIES CONTAINED IN THE "DUAL INTENT" JURY INSTRUCTION

The government's argument relating to the proper jury instruction on intent to defraud (Opp. at 16-17) is plagued by two principal deficiencies. First, the government argues that Woodward failed to cite any circuit court decision requiring a de minimus intent instruction of the type proffered by Woodward. Opp. at 16. Thus, the government contends, there is no disagreement among the lower courts warranting further review by the Court. Opp. at 16.

In fact, Woodward cited numerous circuit court cases in his brief to the First Circuit requiring such an instruction in other federal criminal cases. See, e.g., U.S. v. Wolf, 787 F.2d 1094, 1097-98 (7th Cir. 1986) (conviction reversed for plain error where "the judge failed to inform the jury of the difference between an incidental intent and ... a dominant or compelling or efficient cause"); U.S. v. Drury, 582 F.2d 1181, 1185 (8th Cir. 1978) (jury properly instructed that immoral purpose must be "one of the

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[5] Illustrative also of the standardless nature of this §1346 convictions is evidence of the type that a former staffer called Woodward "the most pro-life-insurance-industry chair" during the staffer's ten year tenure at the Committee. Opp. at 3. If Woodward was in fact the most pro-life insurance chair, did he become that way as a result of the gratuities, and/or in order to continue receiving them? Or, as evidence showed, was it because of his background as an insurance salesman and the naturally pro-business philosophy (A423) he possessed when first elected?

dominant purposes" of interstate travel in Mann Act prosecution); U.S. v. Tyler, 424 F.2d 510, 512 (10th Cir. 1970) (unlawful purpose must be "one of the efficient and compelling purposes in the mind of the accused" in order to support conviction under Mann Act). While Woodward believes these authorities serve as conflicting lower court precedents, to the extent these decisions are deemed not to be conflicting because they do not involve §1346, this represents once again the need for intervention by this Court to fill a jurisprudential gap in honest services cases. Sup. Ct. Rule 10(c).

Finally, the government contends that even if such an instruction were warranted, Woodward was not prejudiced by the district court's failure to give it. Opp. at 17. Because the evidence amply supported the jury's finding Woodward had the requisite intent to defraud, the government posits, there is no basis for his claim that he accepted gratuities from Sawyer primarily for a lawful purpose and only to a de minimus extent for an unlawful purpose. Id.

But the government's argument once again disregards the need for this Court to furnish guidance to district courts and circuit courts on the proper standards to govern §1346 cases. Such guidance is necessary to ensure that juries are instructed properly on the elements, and succeed in drawing the very fine line separating criminal from non-criminal conduct in this most difficult area. Only when instructed properly about where that line should be drawn -- and that it should be drawn on the acquittal side when unlawful intent is de minimus -- may a jury's verdict be a proper basis for conviction of a §1346 defendant. In light of the present, relatively uninformed state of the law in such cases, only a properly charged jury may make this determination, and no

assessment by court of appeal or by the government may substitute for such a verdict.

III. CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

Bruce A. Singal
DONOGHUE, BARRETT & SINGAL, P.C.
One Beacon Street, Suite 1320
Boston, Massachusetts 02108
(617) 720-5090

Counsel for Petitioner

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